PUBLIC PROSECUTOR

v.

CHOU TAI CHUAN & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL APPEAL NO. 50 & NO. 51 OF 1987]
21 NOVEMBER 1987

CRIMINAL LAW AND PROCEDURE: *Bail - Estreatment of bail bonds - Section 404 CPC - Respondent failed to turn up on hearing date of appeal - Cross-appeal by DPP against sentence - Respondent released on bail pending hearing of appeal - Bailor had no notice to produce respondent on relevant date - Whether bailor had to show cause - 2nd Bailor aware respondent and husband intending to go on tour - Whether bailor took sufficient steps to ensure respondent would not abscond - Question of negligence on part of bailor - Notice on bailor to produce respondent on scheduled date not served - Whether bailor had to show cause.*

In this case, both the respondents who were husband and wife were charged separately in the Magistrate's Court Kuala Lumpur and they pleaded guilty to a charge under s. 12(1) of the Passports Act 1966. However the wife pleaded guilty to another charge as well under s. 24(1) of the National Registration Regulations 1960. On all the charges the learned Magistrate sentenced them to term of imprisonment. Both the respondents appealed to the High Court against their sentences of imprisonment and they were released on bail pending appeal. The Public Prosecutor had also lodged cross-appeals against the sentences imposed by the Magistrate.

However on the dates scheduled for hearing of the appeals both the respondents failed to turn up. The Court then considered the matter relating to the estreatment of the bail bonds under s. 404 of the Criminal Procedure Code.

Held:

[1] In respect of Criminal Appeal No. 50 of 1987 bailor Quak May May had no notice to produce the Accused on the relevant date and she could not be held responsible for failure to so produce the respondent. Therefore she did not have to show cause why penalty had to be levied against her and accordingly she was discharged from having to show cause.

[2] As for bailor David Siew he had failed to take sufficient steps to make sure that the respondent would not abscond when he was aware that the respondent and her husband intended going on a tour. Nevertheless although he acted responsibly for a great part this lapse while not wholly negligent was nevertheless conduct which could not be ignored showing some measure of negligence. In the circumstances a sum of RM5,000 was forfeited.

[3] As for the bailors who stood surety for the release of the respondent in Criminal Appeal No. 51/87 pending appeal the evidence showed that the police process servers had not served notices on the bailors to produce the respondent for the scheduled date of the hearing at the High Court.

[4] Since there was no proof to show that the bond had been forfeited the bailors were accordingly discharged from having to show cause.

[Order accordingly.]

Cases referred to:
Khor Ewe Suan & Anor. v. PP [1964] MLJ 220
Tarni Yadav & Anor. v. State [1962] 2 Cr L Jour 627
Pohap Singh Bharmasingh v. State [1961] 1 Cr L Jour 673
Fateh Chand Wadhumal v. Emperor 41 Cr L Jour 802

Legislation referred to:
Criminal Procedure Code, s. 404
National Registration Regulations 1960, reg. 24(1)
Passports Act 1966, ss. 12(1), (1)(k)
Criminal Procedure Code [Sing], s. 416

Other source referred to:
Mallal's *Criminal Procedure*, 4th Edn.

For the public prosecutor - Raus bin Shariff, DPP
For the respondents - Mohd. Faidz bin Darus; M/s. A. Malik & Lawrence Tan.

JUDGMENT

KC Vohrah J:

Two persons, husband and wife, were charged separately before a magistrate.

The husband, Henry Ong Yip Chung, pleaded guilty to a charge under s. 12(1) of the Passports Act 1966. His wife, Chou Tai Chuan, pleaded guilty to two charges, one under s. 12(1) of the Passports Act 1966 and the other under Reg. 24(1) of the National Registration Regulations 1960. On all charges sentences of imprisonment were passed by the Magistrate. Both appealed against their sentences of imprisonment and were released on bail of RM40,000 in two sureties each.

The Public Prosecutor lodged cross appeals against the sentences passed by the Magistrate.

The appeal and cross-appeal (FTCA 50/1987) against the sentences in respect of the wife, Chou, were scheduled for hearing on 25 September 1987. She did not turn up on the date. Encik Faidz, her Counsel, informed the Court that Chou might have absconded. He also informed the Court that the appeal involving Chou's husband was coming up for hearing on 28 September 1987.

I indicated to the DPP, Encik Tan Hock Chuan, and to Encik Faidz that the matter of the estreatment of the bail bond in respect of Chou would have to be considered.

On 28 September 1987 the appeal by Henry Ong and the cross-appeal by the DPP (FTCA 51/1987) came up for hearing. Henry Ong failed to turn up.

The DPP this time, Encik Zaini Abdul Rahman, intimated to the Court that both Henry Ong and his wife, Chou had absconded. He requested for an adjournment in respect of the estreatment of both bail bonds which had been executed allowing for their release pending the appeals. He said he needed to receive instructions from the police on the matter.

At the next date of hearing on 10 October 1987 the DPP, this time Encik Tan Hock Chuan, stated that he needed time for the proceedings relating to the estreatment of the bonds. This was after I had sketched out the procedures which I expected to be adhered to in respect of the estreatment of the bonds under s. 404 of the Criminal Procedure Code, bearing in mind Malaysian and Indian authorities on the matter.

In *Khor Ewe Suan & Anor. v. PP* [1964] MLJ 220, Hepworth J established guidelines for the procedure for the forfeiture of a bail bond under s. 404(1) of the Criminal Procedure Code. Hepworth J quoted with approval certain passages in Mallal's *Criminal Procedure*, 4th Edn., where comparable provisions of s. 416 of the Singapore Criminal Procedure Code were considered. Hepworth J had this to say on the procedure at p. 221:

> ... It seems to me that evidence should have been led producing the actual bail bond and stating that the bailors were the actual persons who entered into the bond. They should be given opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should be invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required ...

I would add that the fact of the accused being absent on the date of hearing would be apparent to the Court before which the hearing was supposed to have been heard as this would have been observed by the Court and no independent evidence is necessary to prove such absence (see *Tarni Yadav & Anor. v. State* [1962] 2 Cr L Jour 627 and *Pohap Singh Bharmasingh v. State* [1961] 1 Cr L Jour 673, Indian authorities on s. 514 of the Indian Criminal Procedure Code which substantially corresponds with s. 404 of the Malaysian CPC). My record of the fact of the absence of the accused on the date fixed for the hearing of the appeal and cross-appeal is sufficient.

And it must of course be shown that since the date of the hearing of the appeal was not known to the accused or to the bailor, it not having been fixed in the bail bond itself, notice thereof had to be sent to the bailor to produce the accused on the scheduled date (see *Fateh Chand Wadhumal v. Emperor* 41 Cr L Jour 802).

After the taking of evidence and the Court is satisfied that the bond has been forfeited the surety may be called to show cause why the penalty should not be levied. And the surety would be invited to the witness box and state his case, if he so wishes, calling any further evidence if required (see *Khor Ewe Suan & Anor. v. PP*, *ibid*., at p. 222).

I indicated to the DPP that since there were 2 bonds with two bailors each separate proceedings would have to be considered in respect of the forfeiture of each bail bond.

At the next hearing of the matters on 31 October 1987, the DPP, Encik Zaini, informed the Court that the prosecution could not go on with the proceedings as the police personnel who served the notices to bailors were not present; and the hearing was adjourned to 5 November 1987.

On this re-scheduled date with DPP, Encik Raus Mohd. Shariff, conducted the forfeiture proceedings in respect of each bond separately. And I shall, in this judgment, deal first with the proceedings in respect of the appellant, Chou Tai Chuan in FTCA 50/1987 and then with the proceedings in respect of Henry Ong Yip Chung in FTCA 51/1987.

F.T.C.A. 50/1987

The bailors in respect of the bond executed for the release of Chou Tai Chuan were present at the inquiry. They were David Siew and Quak May May and they heard the evidence that was adduced.

The Magistrate who convicted and sentenced Chou Tai Chuan gave evidence that she allowed stay of execution on the sentences pending appeal. She released the accused on her and the two sureties David Siew and Quak May May, executing a bond for RM40,000

on 6 March 1987. She said that in the course of the hearing of the case she impounded the accused's certificate of identity.

While the surety David Siew had notice of the date of hearing of the appeal and this his counsel conceded, Quak May May, according to the DPP was not served with the notice. I requested David Siew to show cause why the penalty should not be levied.

As far as Quak May May was concerned since she had no notice to produce the accused on the relevant date she could not been held responsible for failure to so produce the accused. She therefore did not have to show cause why penalty had to be levied against her. And I accordingly discharged her from having to show cause.

As for David Siew it was in evidence, and this the DPP conceded, that he had for the most part acted responsibly, having taken steps to put Chou who is the wife of Henry Ong the uncle of Siew's wife into Shangrila Hotel and checking on them every day by communicating with them over the phone and at lunches or dinners from the day they went to the hotel on 6 March 1987 to 3 April 1987. But he said that on 3 April 1987 over dinner Chou told him that she and her husband would like to go for a tour of the other parts of West Malaysia since they had nothing much to do. The next day he could not get in touch with them and on the 7 or 8 April he then informed the counsel of their absence and on 10 April 1987 he lodged a police report. A week later he reported the matter to the Magistrate who originally granted bail to the accused. He said that a normal tour would take 3 to 7 days. He stated at the back of his mind he thought they had gone on a tour and since they had his telephone number he expected them to call him. He kept calling the hotel and then he reported the matter to his counsel.

But as the DPP argued, he should have asked Chou which tour they were going on knowing full well he had to produce the accused in Court when called to do so by the Court.

No doubt Siew was lulled into a false sense of security that Chou could not go out of the country since her travel document had been impounded by the Court. It is clear that he did take steps before 4 April 1987 to inform and assure himself about her whereabouts. But on 3 April 1987 when Chou told him about the tour he should have warned Chou and her husband against going on the tour or at least have kept himself informed of their itinerary, the name of the tour operator, or the duration of the tour and when they intended to leave on the tour. The least he could have done was to ask them how he could get in touch with them. To my mind he failed to take sufficient steps to make sure that Chou would not abscond when he was aware that she and her husband intended going on a tour. While he acted responsibly for a greater part, this lapse, while not wholly negligent, was nevertheless conduct which I could not ignore showing some measure of negligence. I considered that a fair amount of the amount of penalty to be forfeited should be RM5,000 and I accordingly forfeited RM5,000.

F.T.C.A. 51/1987

The bailors who stood surety for the release of Henry Ong Yip Chung, Liew Nooi @ Liew Lin Ying and Beryl Ang Geok Har @ Ang Geok Ha were present during the proceedings.

The evidence of the Magistrate in this matter was that she sentenced Henry Yip to a term of imprisonment for an offence under s. 12(1)(k) of the Passports Act 1966. Upon application of defence counsel she stayed execution of the sentence pending appeal. Bail of RM40,000 in two sureties was allowed and the bail bond was duly executed on 6 March 1987. The bailors were Liew Nooi @ Liew Lin Ying and Beryl Ang Geok Har @ Ang Geok Ha.

But the evidence was clear that the police process servers had not served notices on them to produce the accused for the scheduled date of the hearing at the High Court; they had served on two other persons instead.

To my mind no proof had been shown that the bond has been forfeited. The DPP conceded that they should be discharged. And I accordingly discharged them from having to show cause.

Also found at [1988] 1 CLJ 181